IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 1068 OF 1988

THE STATE OF MAHARASHTRA .. APPELLANT

vs

PANCHAPPA REVAPPA KAPASE)

R/o Aherwadi, Taluka South)

Solapur, Dist. Solapur) .. RESPONDENT

Mr. I.S. Thakur, APP

Mr. P. P. Hudlikar for respondents

CORAM:-SMT. RANJANA DESAI &

A. S. OKA, JJ.

DATED:-28-9-2004

ORAL JUDGMENT:-(Per Smt. Ranjana Desai)

The respondent ("the accused" for convenience) was tried in the court of IV Additional Sessions Judge at Solapur in Sessions Case No. 79 of 1988 for offences punishable under Sections 447 and 302 of the Indian Penal Code ("I.P.C." for short). By his judgment and order dated 26th August, 1988, the learned Sessions Judge acquitted the

accused and hence this appeal.

2. At the trial the case of the prosecution was as follows:

PW 8 Ramchandra, PW 10 Ningraj, Shivayanama, Pandit and deceased Jagdish were brothers. They come from village Hotagi. Field Gat No. 484 situate at Mouje Aherwadi, is bequeathed to Ramchandra and his brothers by their grand-mother. The brothers have partitioned the estate between themselves. Field Gat No. 484 is equally divided into five portions. Portion of this field adjoining field Gat No. 485 of Revappa Kapse was allotted to the share of deceased Jagdish. Admittedly there were quarrels between the family of the deceased and the family of the accused regarding the location of the common bund between field Gat No. 485 and field Gat No. 484.

PW 4 Jagdevi, the wife of Ningraj, PW 6 Saraswati is the, wife of Shivayanamma. Shivayanamma, Ningraj and deceased Jagdish were residing at Aherwadi and were looking after cultivation of field Gat No. 484. Ramchandra, his brother Pandit and their parents were residing at Hotagi and were looking after cultivation of the agricultural lands situated at Hotagi.

On the day of the incident i.e. on 28.11.1987, deceased Jagdish, PW 4 Jagdevi and PW 6 Saraswati were carrying out agricultural operations in Gat No. 484. In the morning the deceased tethered cow on the bund for grazing. There was a quarrel between the accused and deceased Jagdish over this.

After completing the day's work the deceased told PW 4 Jagdevi and PW 6 Saraswati

that they can go back to the village and that he would follow them after getting the cattle. Jagdevi and Saraswati, therefore, started for the village with leaves of Gram -plants and firewood. The deceased went towards the bund. It is the prosecution case that when the deceased went near the cow, the accused came out of the crop of Jowar in his field and assaulted the deceased. The accused dealt axe blow on the deceased as a result the deceased raised cries. The accused dealt axe blows on the stomach, right-hand and right thigh of the deceased. Jagdevi and Saraswati raised cries as a result of which adjoining cultivators namely Kantbur Naga, Sanganbasu Kasim and Kundale came running to the field. The accused ran away with the axe. While running away he dropped the axe by the side of Babul tree. Jagdevi and Saraswati went to the deceased and found that he was dead. They narrated the incident to Kuntburnaga, Sanganbasu and Kasim. These persons gave information to villagers about the murder of Jagdish. As a result PW 14 Channappa Bake sent PW 15 Shivanna Koli and Samadani Kazi to the house of parents of the deceased at Hotgi. This information was received by the parents of the deceased at about 8 p.m. At that time PW 20 Sharan Basappa Patil was also present. Sharan Basappa brought the parents of the deceased in his jeep to Aherwadi. Before coming to Aherwadi, he went to police out-post at Hotgi and gave information about murder to PW 17 P.C.Gaikwad. P.C. Gaikwad also came to Aherwadi. Message was sent to Ramchandra, the brother of the deceased. Ramchandra also gave information to the police at Valsang about the murder of his brother at about 9 p.m. PW 21 PSI Palkar took entry of this information in station diary. He then came to Hotgi and recorded complaint of PW 4 Jagdevi which is at Exh. 27. F.I.R. was sent to police station for registration of offence. PW 8 H.C. Mane, registered offence. Investigation was started.

On 14th December, 1987 PW 16 H.C. Chavan arrested the accused while he was hiding in Jowar crop. After completion of the investigation the accused came to be charged as aforesaid.

3. In support of its case the prosecution examined as many as 21 witnesses. The prosecution case basically rests on the eye-witness account of PW 4 Jagdevi and PW 16 Saraswati, the sisters-in-law of the deceased. The defence of the accused was one of denial. The evidence led by the prosecution did not find favour with the learned Sessions Judge and he acquitted the accused. Hence this appeal.

4. We have heard at considerable length Mr. Thakur, learned APP in support of his case and Mr. Hudlikar, learned counsel appearing for the respondent.

5. Mr. Thakur contended that the learned Sessions Judge erred in discarding the evidence of PW 4 Jagdevi and PW 6 Saraswati, who are eye-witnesses. He submitted that their evidence is consistent. Admittedly they were with the deceased in the evening on the day of the incident. There are hardly any omissions or contradictions in their evidence. The learned counsel urged that undue importance has been given to delay in recording the F.I.R. He then urged that admittedly the accused was absconding. The absconding of the accused also strengthens the prosecution case. He, therefore, submitted that this court should set aside the order of the acquittal and convict the accused.

6. Mr. Hudlikar, the learned counsel appearing for the respondent on the other hand

submitted that

the evidence of two eye-witnesses does not inspire confidence. The delay in recording the evidence creates doubt about the truthfulness of the prosecution story. He submitted that the view taken by the learned Sessions Judge is a reasonably possible view which should not be disturbed.

7. We have given our anxious consideration to the submissions advanced by both sides. In our opinion, the view taken by the trial court is a reasonably possible view and hence it cannot be disturbed in this appeal against acquittal.

8. The fact that there was dispute over the bund between Gat No.484 which was in possession of the deceased and the adjoining land of Revappa Kapse, the father of the accused has been sufficiently established. There was no debate over this before us. It is, therefore, not necessary for us to go into that part of the evidence. We will proceed to deal with this case with the background of the admitted enmity between the two sides.

9. Once it is admitted that there was enmity between the two sides, the evidence will have to be scrutinized cautiously to rule out possibility of false implication.

10. So far as the incident in question is concerned Jagdevi has stated that on the day of incident she along with the deceased and PW 6 Saraswati had gone to the field for agricultural operation. In the morning there was exchange of words between the deceased and the accused because the deceased had tethered the cow on the common bund. Thereafter they completed their work. They were to return to their house. The

deceased told them that they should go to their house and he will follow them after getting the cow. The deceased went to the common bund where the cow was tethered. At that time the accused who was hiding in the Jowar crop standing in the field suddenly came forward and inflicted axe blows on Jagdish. He dealt blow on the back of the neck of the deceased as a result of which Jagdish fell down. The accused continued to inflict axe blows on the deceased. He dealt axe blows on the stomach, on the side of neck and, on the right thigh, below right knee of the deceased. When she and Saraswati saw this they ran towards the accused to apprehend him. However, they could not catch him. The accused ran away leaving the axe. She and Saraswati raised cries. In response to their cries Kasim, Sanganbasu and Kantabur Naga came there. They went near the deceased. They saw that he had sustained injuries. At that time Jagdevi and Saraswati told Kasim, Sanganbasu and Kantabur Naga that the accused has assaulted the deceased. The deceased had expired when they approached him. In the cross examination Jagdevi has stated that they went back to their house. They decided to go to Hotgi in jeep. Deputy Sarpanch Kalappa Bake came to their house. Sarpanch Sharnappa Patil also came to their house. Jagdevi has further stated that it is a fact that there was a discussion at the house for about half an hour or one hour as to who should lodge the complaint and the nature of complaint. She has then stated that she reached Hotgi and lodged the report. She has further stated that Saraswatibai Shakuntawwa, Chandrawwa were in the jeep.

11. In our opinion, it is very risky to rely on the evidence of this witness. It is true that she says that she had seen the incident of assault and she involves the accused but the fact remains that she has admitted that when she went home, there was a discussion in her house for about half an hour to one hour as to who should lodge the complaint and the

nature of the complaint. This statement of Jagdevi gives a severe blow to the prosecution case. Admittedly several persons were in the house. In our opinion,therefore, considering the admitted enmity between two sides. the possibility of the members of the family concocting story cannot be ruled out.

12. It is also significant to note that PW 21 PSI Tukaram Palkar, investigating officer has stated that at 9 p.m. Ramchandra came to him and informed him about the incident. PSI Palkar has stated that he recorded the F.I.R. of Jagdevi from 10-30 to 12-30 p.m. However, according to Jagdevi she had gone to Hotgi. She reached Hotgi at about 2 a.m. Her F.I.R. seems to have been lodged at 2 a.m.

13. PW 18 PC Jamdar has said that on the basis of F.I.R. Exh. 27 registered a case at 3 a.m. According to PW 8 Ramchandra, PSI Palkar reached Aherwadi at 11 p.m. Therefore, though PSI Palkar had reached Aherwadi at 11 p.m. he did not record F.I.R. of Jagdevi. Her F.I.R. came to be recorded much later at about 2 a.m. at Hotgi. Against this background the admission made by Jagdevi that there was discussion as to who should lodge the F.I.R. and what should be the nature of F.I.R., in our opinion, reflect on the credibility of the prosecution story.

14. Besides it is significant to note that according to Jagdevi the deceased had told her that they should go home and he would follow them after getting his cow. Jagdevi has in her evidence admitted this. She has stated that the deceased went to common bund for bringing the cow. It is not clear from the evidence at what place these two ladies i.e. Jagdevi and Saraswati were when the incident is supposed to have taken place. PW 7

Nagappa Kantbur who is supposed to have come there after hearing the cries of the two ladies has said in his evidence that after hearing the cries of the ladies he along with Kasim and Sanganbasu went to the field of the deceased. They saw the dead body of the deceased. The two women told them that the accused has assaulted the deceased and ran away. They saw the accused running away. However, in the cross-examination he has stated that they met the ladies while they were near the road in their field. This statement made by Nagappa indicates that the ladies were on their way to their house. As to how far they had gone is not clear from the evidence. It is doubtful whether they were at a distance from where they could have turned round and seen the incident. It is true that Nagappa says that he saw the accused running away but he has stated that they did not accost the accused. They did not make any inquiry with him. This conduct of Nagappa is also unnatural. Moreover there is no corroboration to the evidence of Nagappa because Kasim has not been examined and Sanganbasu who was supposed to be with him has turned hostile.

15. PW 6 Saraswatibai has also tried to support PW 4 Jagdevi. She has confirmed that she along with Jagdevi and the deceased had gone to the field on the day of the incident. She has further stated that after they completed their work the deceased told them that they should go back home and he would follow them after getting the cow. After saying this the deceased started going to the common bund for getting the cow. When the deceased bent down for releasing the cow, the accused who was hiding in Jowar crop came out and dealt axe blow over the neck of the deceased with the result the deceased fell down. They raised cries. On account of the cries Nagappa, Sanganbasu and Kasim came there.

16. It is significant to note that in her statement before the police this witness has stated that after deceased told her that they should go back home they started going towards the house carrying vegetables and fire-wood collected earlier. In her cross-examination this relevant portion in her police statement has been shown to her she has stated that she could not give reason why this fact is incorporated in her statement. All this does suggests that the two ladies were going towards their house. They were on the road. It is extremely doubtful therefore whether they were at such a distance from where they could turn round and see the incident. Besides though Saraswatibai has stated that the accused assaulted the deceased with an axe and that there was axe in his hand when axe article 4 was shown to her she has stated that this axe was not used by the accused. PW 11 Sidram Kapse is the child witness whose statement was recorded under Section 164 of the Code of Criminal Procedure by PW 12 Dayanand Mane the Special Judicial Magistrate in which Sidram Kapse is alleged to have said that the accused informed him that he had killed Jagidish. However, PW 11 Sidram has disowned his statement in the court.

17. In our opinion, all these circumstances taken along with admitted enmity between the two sides make the prosecution story vulnerable. We cannot be oblivious of the fact that we are dealing with an appeal against acquittal. Therefore, even if some other view is possible on the basis of the evidence before us, if the view taken by the trial Court is a reasonably possible view it would not be proper for us to interfere with it. We, feel that the view taken by the learned Sessions Judge is a reasonably possible view. We are unable to interfere with it. Hence the appeal is dismissed.

(SMT. RANJANA DESAI, J.)

(A. S. OKA, J.)